Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	:	
	:	
Rules and Regulations Implementing the Telephone consumer Protection Act of 1991	:	CG Docket No. 02-278
	:	
	:	CG Docket No. 05-338
	:	
Junk Fax Prevention Act of 2005	:	

COMMENTS OF THE ATTORNEYS GENERAL OF ARKANSAS, CONNECTICUT, KENTUCKY AND NEW MEXICO

January 18, 2006

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

We, the undersigned Attorneys General of Arkansas, Connecticut, Kentucky and New Mexico, submit these comments in connection with the review by the Federal Communications Commission (the "FCC" or the "Commission") of rules proposed pursuant to the Junk Fax Protection Act of 2005 (the "Junk Fax Prevention Act").[1] The Commission requested comments pursuant to a Notice of Proposed Rule Making ("NPRM") issued December 9, 2005 and published in the Federal Register on December 19, 2005.[2]

In these comments, the undersigned Attorneys General urge the Commission to consider the costs in resources, time, inconvenience and lost opportunities borne by individuals and businesses that are inundated with unwanted and often deceptive facsimile advertisements. We ask the Commission to enact the strongest possible protections for consumers by adopting rules to limit the breadth and duration of the Established Business Relationship ("EBR") exception to the ban on unsolicited facsimile advertisements, to facilitate recipients' ability to "opt out" of future advertisements, and to require both advertisers and fax broadcasters to disclose their full identities.

Moreover, we urge in no uncertain terms that the Commission not attempt to usurp state authority and attempt to strip the states of the power to enforce laws that

---

[1] Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005)(the "Junk Fax Prevention Act").

[2] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket 02-278, CG Docket 05-338, Notice of Proposed Rulemaking and Order (2005 Notice).

their citizens, through their elected representatives, have determined are necessary to protect their privacy both at home and in their places of business.[3] The states have demonstrated themselves to be effective partners of the Commission in enforcing the protections of the Telephone Consumer Protection Act of 1991 ("TCPA").[4] We encourage the Commission to keep the interests of consumers paramount as it considers the impact of the Junk Fax Prevention Act's amendments to the TCPA, and we look forward to continuing cooperative efforts to preserve our citizens' privacy and to protect them from the financial burden imposed by unsolicited fax advertisements.

---

[3] We adopt and incorporate herein by reference the comments of the Attorneys General of Arkansas, California, Connecticut, Kentucky, Maryland, New Mexico, Oklahoma, Vermont, West Virginia and Wisconsin submitted in the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket 02-278, CG Docket 05-338, Petition for Declaratory Ruling of the Fax Ban Coalition (January 13, 2006).

[4] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991)("TCPA"), codified at 47 U.S.C. § 227.

II. DISCUSSION

The right of consumers to protect themselves from unwanted solicitations is well established.

> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property.... To hold less would tend to license a form of trespass and would hardly make more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home.... The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Rowan v. United States Post Office Dep't, 397 U.S. 728, 737, 25 L.Ed.2d 736, 90 S.Ct.1484 (1970)(internal citations omitted). Consistent with these principles, Congress adopted the TCPA in an effort to counter the growing threat to consumer privacy posed by telemarketing calls and related practices. As originally enacted, the TCPA prohibited the use of any telephone facsimile machine, computer or other device to send an "unsolicited advertisement" to a telephone facsimile machine.[5] An unsolicited advertisement was defined as "any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's express invitation or permission."[6]

---

5 47 U.S.C. § 227(b)(1)(C).

6 47 U.S.C. § 227(a)(4); 47 C.F.R. 64.1200(f)(5).

A. THE 2003 TCPA ORDER

In 2002, the Commission sought comment on whether its rules needed to be revised in order to implement more effectively the mandates of the TCPA.[7] The Commission invited comment on, among other issues, whether an established business relationship between a fax sender and recipient was sufficient to constitute consent to receive fax advertisements.[8] Following the adopting of the TCPA, the Commission had taken the position that fax transmission from advertisers who had an EBR with recipients could be deemed to be invited or permitted.[9] One of the Commission's reasons for seeking comment was to obtain input about the need to clarify what constituted prior express invitation or consent to receive unsolicited fax advertisements.[10]

The Commission released its findings and conclusions in July 2003.[11] It found that "despite a general ban on faxing unsolicited advertisements, and aggressive enforcement by the Commission," fax advertisements continued to proliferate.[12] Such advertisements, the Commission noted, imposed costs on recipients, caused

---

7 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 and CC Docket No. 92-90, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, 17460, ¶ 1 (2002)("2002 Notice")

8 2002 Notice, 17 FCC Rcd at 17483, ¶ 39.

9 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8779-80, ¶ 54, n. 87 (1992)("1992 TCPA Order").

10 2002 Notice, 17 FCC Rcd at 17482-83, ¶¶ 38, 39.

11 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket 02-278, Report and Order, 18 FCC Rcd 14014 (2003)("2003 TCPA Order").

12 2003 TCPA Order, ¶ 8.

inconvenience and disruption and could, under some circumstances, have implications for public safety.[13] The Commission reported that not only did recipients have to bear the costs of paper and toner needed to print the ads, they also had to devote time to reading and disposing of the faxes, lost the use of their fax machines while the ads were being received, and even had to suffer the intrusion from ads arriving in the middle of the night.[14]

The Commission concluded that the TCPA as it then existed did not allow for the transmission of fax advertisements without the recipient's prior express written consent.[15] The Commission went on to suggest several ways advertisers could secure the necessary authorizations, and it opined "that even small businesses may easily obtain permission from existing customers who agree to receive fax advertisements, when customers patronize their stores or provide contact information."[16] It further concluded that membership in a trade or professional organization and publication of one's fax number in a membership directory did not constitute an invitation to receive fax advertisements.[17] Companies publish their fax numbers "for a variety of reasons, [the Commission noted,] all of which are usually connected to the fax machine owner's business or other personal or private interests. *The record shows that they are not distributed for other companies' advertising purposes.*"[18] The Commission concluded

---

13 Id., ¶ 8, n. 35.
14 Id., ¶ 186.
15 Id., ¶¶ 186, 189.
16 Id., ¶ 191.
17 Id., ¶¶ 192, 193
18 Id., ¶ 193 (emphasis added).

that it would no longer view an EBR as providing advertisers with the necessary express permission to fax advertisements to their customers.[19] It therefore adopted rules requiring advertisers to obtain recipients' prior express written consent before transmitting fax advertisements.[20]

B. THE JUNK FAX PREVENTION ACT

The Commission never implemented its revised unsolicited fax rules, instead issuing a series of orders delaying their effective date.[21] In the interim, Congress adopted the Junk Fax Prevention Act which made several changes to the TCPA's treatment of unsolicited fax advertisement by

- amending 47 U.S.C. § 227(b)(1)(C) to include a specific EBR exemption to the statutory ban on unsolicited fax advertisements;
- amending 47 U.S.C. § 227(a) to include a definition of EBR to be used in the context of unsolicited fax advertisements;
- mandating that senders of unsolicited fax advertisements include both a notice informing recipients of their right to "opt-out" of receiving future advertisements and sufficient information to enable recipients to exercise such option at no cost to them; and
- defining when such an opt-out would be deemed to be valid.[22]

Congress also amended the definition of unsolicited advertisement to provide that a recipient could express her consent to receive advertisements "in writing or otherwise."[23]

---

19 Id., ¶ 189.
20 Id.; 47 C.F.R. § 64.1200(a)(3)(i).
21 See 2005 Notice, ¶¶ 5, 6.
22 Junk Fax Prevention Act, § 2(a)-(d).
23 Id., § 2(g).

Congress' changes to § 227 fall far short of creating an unrestricted license to transmit unsolicited fax advertisements. While the legislation codifies the EBR exemption, even a sender claiming to have an EBR with a recipient may not fax an unsolicited advertisement unless it has also legitimately obtained the recipient's fax number, *and* the fax itself includes the mandatory opt-out notice. Likewise, a sender who does not have an EBR with a recipient may not "cold-fax" an advertisement simply because the recipient's fax number may be publicly available, and the fax itself includes an opt-out notice.

Our interpretation of the Junk Fax Prevention Act is supported by its legislative history. The report from the Senate Committee on Commerce, Science and Transportation states that the amendment allows the sending of an unsolicited fax "if the fax is sent based on an EBR *and* certain conditions are met."[24] Although the legislation makes limited concessions in the case of an EBR, it thus continues to recognize recipients' right to be protected against unwanted fax advertisements.[25]

Therefore, despite this concession, we believe that the TCPA, as amended by the Junk Fax Prevention Act, can continue to serve as a powerful deterrent to the improper transmission of fax advertisements. This can happen, however, only if the Commission adopts rules recognizing both the limited exception created by Congress and recipients' well-established right to avoid unwanted sales solicitations.

---

[24] Junk Fax Prevention Act of 2005, S. Rep. No. 109-76, 109th Congress, at 6 ("Senate Report"), reprinted in 151 Cong. Record 319, 324-25 (2005)(emphasis added).

[25] Id., at 6, 151 Cong. Record at 325.

C. THE PROPOSED RULES

In considering the changes to its rules necessitated by the Junk Fax Prevention Act, we ask the Commission to recall its earlier findings regarding the problems faced by recipients beset by an unending stream of unsolicited and unwanted fax advertisements. At best, recipients view these communications as a nuisance; at worst the ads are a disruptive, costly and time consuming intrusion into their homes or businesses. We encourage the Commission to look to other regulatory frameworks for guidance as to how to address this problem and fashion its new rules in a manner that provides the greatest possible protections for business and individual privacy.

1. The EBR Exemption Must Be Narrowly Construed

Congress and the Commission have in recent years cast an unfavorable eye on those advertising practices which impose costs on the recipients. For that reason, the TCPA prohibits telemarketing calls to wireless numbers without the subscriber's express consent because the subscriber is charged for the time used.[26] We submit that the EBR exemption created by the Junk Fax Prevention Act must be viewed in this light, and we urge the Commission to construe the exemption narrowly.

We suggest first that the Commission adopt rules which expressly limit the EBR to only those advertisers with whom the recipient has entered into a contract or from whom the recipient has purchased goods or services, or in the event there is no completed

---

[26] 2003 TCPA Order, ¶ 190; 47 U.S.C. § 227(b)(1).

contract or transaction, who have received an application or inquiry from the recipient. If an advertiser's contacts with a recipient have been limited to an application or inquiry, we strongly suggest that the rules provide that an EBR will not come into existence unless the recipient initiated the original contact with the advertiser, and that the contacts themselves amount to something more that casual communications. Moreover, we suggest that the relevant contacts must be between the recipient and the advertiser, and not some third party such as a fax broadcaster or telemarketer. We are concerned that any ambiguity on these points could provide an avenue for abuse as advertisers look for any contact, no matter how tenuous, to support an alleged EBR.

We also suggest that the Commission promulgate rules compelling advertisers to document the precise circumstances giving rise to an EBR with each recipient. Such records may include, but not be limited to, telephone logs, payment or delivery histories or customer service records which, presumably, are already being maintained by the advertisers.

With respect to the second statutory prerequisite for sending unsolicited fax advertisements, the Commission has previously acknowledged that businesses and individuals disseminate their fax numbers for their own reasons and interests and not because they necessarily want to receive fax advertisements.[27] Accordingly, we propose that advertisers must be required to document how they came into possession of recipients' fax numbers. If the advertiser claims that the number was disclosed in the

---

[27] 2003 TCPA Order, ¶ 193.

context of an EBR, it should be able to demonstrate the precise manner in which the information was communicated, such as on an order form, application or information request. Any advertiser relying on such a disclosure must, however, also be required to show that the recipient had notice that the information would be used for advertising purposes.[28]

Similar considerations apply if the advertiser claims that the recipient made its fax number generally available. For example, a doctor who publishes her fax number in a medical society directory should not be deemed to have made the number publicly available if there is no reasonable expectation that the directory is intended for use by third parties or for marketing purposes. The considerations against public disclosure are strengthened if the publisher instructs users not to provide the directory to others, as is the case with some college or university alumni directories.[29]

We believe that it is in the interests of advertisers and recipients alike for the Commission to develop objective criteria to assist in determining when a fax number will be considered to have been made available either in the context of an EBR or for public distribution. Recipients will then know what steps they will need to take in order to protect their fax numbers from advertisers, and advertisers will be able to assess whether such numbers are accessible for marketing purposes.

---

[28] The Commission should require that those advertisers who claim that an EBR predates the enactment of the Junk Fax Prevention Act should be able to document not only that an EBR existed, but also that they were in actual possession of recipients' fax numbers, even if they do not need to show how the obtained such information.

[29] See, e.g., Alumni Directory, Swarthmore College, at VII (1989).

Next, we urge the Commission to promulgate specific rules to clarify that the EBR exemption applies *only* where the entity whose goods or services are being advertised, i.e., the "seller" as that term is defined in 47 C.F.R. § 64.1200(f)(5), is the party claiming the EBR with the recipient. We do not read the Junk Fax Act to allow businesses to transfer the privileges arising from an EBR to third parties, such as to a fax broadcaster who distributes ads for many different companies, affiliates or subsidiaries.

2. The EBR Must Have a Very Limited Lifespan

We support the Commission's proposal to define EBR in a manner consistent with both the Commission's rules governing telephone solicitations[30] and the Federal Trade Commission's definition of EBR under the Telemarketing Sales Rule.[31] The Commission's proposed definition not only allows for consistency in enforcement across different regulatory schemes,[32] it should also facilitate compliance by advertisers who are already familiar with its terms.

We also endorse the Commission's stated intention to limit the duration of an EBR. We submit, however, that the Commission should mandate a shorter lifespan for an EBR relating to unsolicited fax advertisements than the eighteen months from last transaction/three months from last inquiry/application that is embodied in the Commission's current proposal. We recognize that the "18/3" rule is found in other

---

30 See 47 C.F.R. § 64.1200(f)(3).
31 See 16 C.F.R. § 310.2(n).
32 Senate Report, at 5, 151 Cong. Record at 323.

regulations governing telemarketing practices, but we also note that such other practices do not involve the same shifting of direct economic costs, as well as lost time and opportunities, inherent with fax advertising. By imposing a much shorter lifespan on the unsolicited fax EBR, the Commission will be acting in a manner consistent with the legislative and regulatory disfavor shown toward practices where advertising costs are transferred to the recipients.

Additionally, if this limitation is to have any meaning, recipients *must* be able to determine who is sending the fax. We therefore propose that all fax advertisements include the full legal name, address and telephone number of the advertiser so that recipients will be able to verify for themselves whether the fax has been sent by someone with whom they have an EBR.

3. The Commission Must Establish Standards for the Opt-Out Notice

a. The Commission should define what constitutes "clear and conspicuous"

The Commission seeks comment on whether it is necessary to set forth in the rules the meaning of "clear and conspicuous" and to describe the circumstances under which notice to the recipient should be considered "clear and conspicuous". It has been the experience of the Attorneys General and that of the Federal Trade Commission ("FTC") that the failure to disclose material facts, necessary qualifications or other important information, or the failure to make disclosures conspicuous, is deceptive. FTC

v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985) (small print disclosure cannot save deceptive general claims). Whether or not a disclosure is "clear and conspicuous" is a question of law. Bassett v. American General Finance, Inc., 285 F.3d 882, 885 (9th Cir. 2002); Tucker v. New Rodgers Pontiac, 2003 WL 22078297, p. 4 (N.D. Ill.).

In Stevenson v. TRW, Inc., 987 F.2d 288 (5th Cir. 1993), a leading case defining "clear and conspicuous", the Fifth Circuit looked to the Uniform Commercial Code for guidance. Taking note of the comment to U.C.C. § 1-201(10) (1992), the court quoted from the comment that "the test is whether attention can reasonably be expected to be called to [the notice or disclaimer]." Stevenson, 987 F.2d at 296.

Continuing its discussion of the meaning and interpretation of the phrase "clear and conspicuous," the Stevenson court commented that, although the phrase is common in federal and state commercial regulatory statutes, there has been substantial litigation interpreting those words.[33] The court reviewed one such case. In Smith v. Chapman, 436 F.Supp. 58, 63-64 (W.D.Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980), the trial court considered a retail installment contract and found that the disclosure requiring the purchase of damage insurance, printed on the back of the contract, in the same size print and type as the rest of the writing on the reverse side of the contract, was not "clear

---

[33] Id., 987 F.2d at 295. See, e.g., the Truth in Lending Act, 15 U.S. C. § 1632; Fair Credit Reporting Act (FCRA) § 1681i(d); see also 12 C.F.R. §§ 226.5(a) and 226.17(a)(1992) (part of Regulation Z).

and conspicuous".[34] In reaching its conclusion, the Chapman court construed the disclosure requirements (under Reg Z) within the context of the U.C.C.'s definition of "conspicuous".[35] The court in Stevenson concurred, quoting that same definition, as follows:

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals ... is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color ... Whether a term or clause is "conspicuous" or not is for decision by the court.

Id., at 295-96.

The Stevenson court further expounded on the circumstances under which a notice or disclaimer may be considered "conspicuous":

> The term "conspicuous" has been construed most frequently with the Uniform Commercial Code § 2-316(2), which requires that any exclusion or modification of the implied warranty of merchantability be conspicuous, and that the exclusion or modification of the implied warranty of fitness for a particular purpose be made in a conspicuous writing. A contract's warranty disclaimer satisfies the conspicuous requirement when it is printed in all capital letters, when it appears in larger type than the terms around it, or when it is in a larger and boldface type. [citations omitted].

Id., at 296.

More recently, the Seventh Circuit stated in Cole v. U.S. Capital, Inc., 389 F.3d 719 (7th Cir. 2004), that:

> [T]here is no one aspect of a notice that necessarily will render it "clear and conspicuous" for purposes of the FCRA.

---

[34] Id., 987 F.2d at 295 (quoting Smith v. Chapman, 436 F.Supp. 58, 63-64 (W.D.Tex. 1977), aff'd, 614 bF.2d 968 (5th Cir. 1980).

[35] Id.

> We must consider the location of the notice within the document, the type size used within the notice as well as the type size in comparison to the rest of the document. We also must consider whether the notice is set off in any other way – spacing, font style, all capitals, etc. In short, there must be something about the way that the notice is presented in the document such that the consumer's attention will be drawn to it.

Cole v. U.S. Capital, 389 F.3d at 731.

The California Supreme Court also has described the meaning of "clear and conspicuous." Haynes v. Farmers Insurance Exchange, 32 Cal.4th 1198, 89 P.3d 381, 13 Cal.Rptr.3d 68 (2004). The Court noted that for a contract term to be clear and conspicuous it "must be placed and printed so that it will attract the reader's attention.... [It] must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson." Id. 32 Cal.4th at 1204. Other states also have addressed the meaning of "clear and conspicuous". See, e.g., Philadelphia Indem. Ins. Co. v. Barerra, 200 Ariz. 9, 21 P.3d (2001), Webster County Solid Waste Auth. V. Brackenrich & Assoc., 219 W.Va. 304, 617 S.E.2d 851 (2005); Hicks v. Methodist Medical Center, 229 Ill.App.3d (1992); Meyer v. Best Western Seville Plaza Hotel, 562 N.W.2d 690 (Minn.App., 1997).

In a joint policy statement, the FTC and the FCC stated the following principles for clear and conspicuous disclosure of material information:

> [I]nformation should be presented clearly and prominently so that it is actually noticed and understood by consumers. Disclosures should be effectively communicated to consumers.... To ensure that disclosures are effective, advertisers should use clear and unambiguous language, avoid small type, place any qualifying information close to the

> claim being qualified, and avoid making inconsistent statements or using distracting elements ... the focus is not on the wording of the specific disclosure in isolation, but rather on the overall or "net" impression that the entire advertisement-including the disclosure-conveys to reasonable consumers.[36]

Given the difficulty of describing precisely under what circumstances a notice will be considered clear and conspicuous, we recommend that the Commission's rules instead state that the term "clear and conspicuous" means the same as that term is interpreted under the FCC/FTC Policy Statement, to the extent not less protective than state law.

b. The Commission should mandate a deadline to implement opt-out requests

Although the Commission's rules governing telemarketing calls require the callers to honor do not call requests within thirty days of the date of the request,[37] we believe that the Commission should mandate a shorter compliance period for opt-outs relating to unsolicited faxes. As discussed above, unsolicited faxes impose costs on recipients not found with telemarketing calls. This alone justifies faster compliance. Moreover, as the FTC's experience with the CAN-SPAM Act has demonstrated, technological advances have made it easier for advertisers to implement opt-out requests.[38] In fact the FTC recently proposed shortening from ten business days to three the period within which

---

[36] Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers, 65 Fed. Reg. 44053, ¶¶ 20, 21 (July 17, 2000).

[37] 47 C.F.R. § 64.1200(d)(3).

[38] Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Notice of Proposed Rulemaking, Fed. Trade Comm'n, 70 Fed. Reg. 25426, 25442 (May 12, 2005).

advertisers must effectuate opt-out requests relating to email advertisements.[39] We therefore urge the Commission to adopt similar time limits for opt-out requests relating to unsolicited fax advertisements.

c. The identification and notice requirements are closely related

i. Current identification requirements are inadequate.

The Commission seeks comment on the interplay between the identification requirement and the notice requirement for senders of unsolicited facsimile advertisements. It has been our collective experience that the number of reported violations of any given state's junk fax law reflects only the slightest fraction of the number of actual violations. Many recipients do not report a violation because of the lack of sufficient identifying information on the unsolicited advertisement.[40] Consequently, the number of reported violations is likely to significantly under represent the number of actual violations that have occurred.

Requiring identity information for the sender helps to protect effectively recipients' rights through enforcement of the TCPA. It has been the states' experience that fax broadcasters, who maintain their own databases of fax numbers and send

---

39 Id.; see also 16 C.F.R. § 316.4(a)(1).

40 In some instances, the sender of the unsolicited advertisement has been identifiable only by a return telephone number provided to the recipient because the name -- or initials, as the case may be -- used by the sender was not sufficiently specific, or lacking entirely.

advertisements on behalf of others to these fax numbers, frequently omit their identifying information as the sender in order to avoid detection and enforcement action. Therefore, where the transmitting entity, be it the advertiser, fax broadcaster or other third party sender, determines the destination of the fax advertisement, requiring that entity to include its identifying information on the fax is essential in order to ensure compliance with the TCPA.

However, the current identification requirements are neither sufficiently specific nor are they, alone, adequate to protect the rights of recipients. The Commission's rules currently require senders of fax advertisements to state "in a margin at the top or bottom of each transmitted page ... or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message."[41] We propose that Commission amend its rules to require senders to state clearly the name under which the sender is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) or d/b/a or an abbreviation of the sender's name that would be apparent to the reasonable recipient. The inclusion of such a provision would assist recipients, the Attorneys General, the FCC, and the FTC alike to identify and pursue the reported violators.

---

41 47 C.F.R. § 68.318(d); see also 47 U.S.C. § 227(d)(1)(B).

ii. Current notice requirements are insufficient to ensure compliance with opt-out requests

Section 2 (c) of the Junk Fax Prevention Act -- Required Notice of Opt-Out Opportunity -- amends section 227(b)(2) of the Act by requiring senders of unsolicited advertisements to (1) include notice on the first page of the facsimile informing recipients how they may contact the sender to request that they not receive future unsolicited facsimile advertisements, and (2) to include domestic telephone and facsimile contact numbers for recipients to transmit such requests to the sender. We propose that the domestic facsimile contact number be a telephone number separate and distinct from the identifying telephone number required for the sending facsimile machines.

It has been the experience of the states that fax broadcasters, third-party agents and other entities which send facsimile advertisements on behalf of a business, as well as a number of (often larger) businesses which elect to send their own facsimile solicitations, utilize multiple facsimile machines or fax servers for the purposes of sending and receiving facsimiles. It is not uncommon for certain machines to be dedicated "send-only" facsimile machines and other machines to be dedicated "receive-only" facsimile machines. Therefore, if the identifying number for the sending facsimile machine is a dedicated "send-only" facsimile machine, it is impossible for a recipient to communicate to the sender via facsimile his or her request not to receive facsimile advertisements in the future. Requiring senders to provide a facsimile machine number for notice purposes distinct from the identifying telephone number will thus help to

ensure recipients' do-not-fax requests are received and complied with consistent with the intent of the Junk Fax Prevention Act.

We also propose that all contact numbers, whether telephone or facsimile, provided for opt-out purposes be cost-free for recipients to use. When a facsimile is sent, the recipient incurs costs to receive the facsimile. As noted above, the sending of unsolicited facsimile advertisements involves cost-shifting in which the seller uses the potential customer's property (facsimile machine, paper, ink) in an attempt to make a sale. Thus, to require a recipient of unwanted facsimile advertisements to incur charges simply to request that no more unsolicited facsimile advertisements be sent would only shift additional costs onto the shoulders of recipients, contrary to the stated purpose of the TCPA, i.e., protecting the public from bearing the costs of unwanted advertising.[42]

Further, we strongly recommend that, if the business advertising the goods or services is not the sender of the facsimile advertisement, then, the notice should include (a) the identity of the business, (b) a valid street address for business' actual place of business; and (c) a domestic or toll-free telephone number for the business which recipients may call to request removal of their facsimile numbers from any list maintained by the fax broadcaster, third-party agent or other entity utilized by the advertiser for facsimile advertising purposes. Moreover, as discussed above, any notice to recipients must be "clear and conspicuous", as that term is interpreted under the FCC/FTC Policy Statement,[43] to the extent not less protective than state law.

---

42 Senate Report, at 3, 151 Cong. Record at 321.

43 65 Fed. Reg. 44053m ¶¶ 20, 21.

iii. The Commission should enumerate appropriate cost-free mechanisms

The Commission also seeks comment on the necessity of enumerating specific "cost-free" mechanisms for recipients of unwanted facsimile advertisements to transmit a do-not-fax request, and, if so, what those mechanisms should be. The Attorneys General strongly believe that the Commission must enumerate specific "cost-free" mechanisms. Email and website addresses may be considered "cost-free" mechanisms, however, not all recipients have access to the Internet. Therefore, although the inclusion of a website or email address may provide some recipients a cost-free means of communicating their requests to opt-out of receiving future facsimile advertisements, not all recipients can be accommodated. Hence the provision of a website or email address, alone, will not suffice to satisfy the requirement that recipients be provided a cost-free mechanism to transmit their do-not-fax requests. The provision of a toll-free telephone number clearly satisfies the requirement that senders provide a cost-free mechanism for receiving do-not-fax requests.

We propose that, in addition to the above "cost-free" mechanisms, a valid street address for the sender be provided in the notice. The inclusion of a street address will not only provide another means by which the recipient of unwanted fax advertisements may communicate his or her desire to opt out of receiving future facsimile advertisements at a *de minimus* cost, but would also assist the Attorneys General, the FCC and FTC to contact reported violators. Finally, the sender should be required to

honor an opt-out request made by mail or email, even if the Commission should elect not to require provision of a valid street address for senders in its rules.

d. The Commission must impose record-keeping requirements

On a related issue, it should be the sender's responsibility to maintain records of requests not to receive facsimile advertisements in the future and records showing that these do-not-fax requests were honored. It has been the experience of the states in litigating TCPA cases that many large-scale fax advertisers have few records reflecting compliance with do-not-fax requests and will also claim that some recipients consented to receive faxes, but have no records to prove consent.

Consistent with the Commission's rules for telemarketers,[44] we propose that, if a person or entity sending an unsolicited facsimile advertisement receives a request from a recipient not to receive facsimile advertisements from that person or entity, the sender must record the request, placing the recipient's name, if provided, and facsimile telephone number on a do-not-fax list at the time the request is made. Persons or entities sending facsimile advertisements must honor a do-not-fax request within the shortest reasonable time from the date such request is received.

We further propose that senders of unsolicited facsimile advertisements be required to maintain records of recipients' do-not-fax requests and records showing that the requests were honored. This, too, is consistent with the Commission's rules for

---

[44] 47 C.F.R. § 64.1200(d)(3).

telemarketers.[45] Moreover, a do-not-fax request must continue to be honored unless and until the recipient gives its express written consent to receive such solicitations. These few requirements should lead to more effective enforcement without imposing more than *de minimus* costs, if any, on either the sender or the business advertising by fax. In fact, such requirements will assist a legitimate business contracting with a fax broadcaster or other third-party agent by enabling it to confirm whether the fax broadcaster or agent is complying with the requirements of the law.

e. The Commission should not relieve small businesses of the duty to provide a cost-free opt-out mechanism

The Junk Fax Prevention Act requires that the Commission determine whether to exempt certain classes of small businesses from the requirement that they provide recipients with a cost-free means to opt-out of future fax ads.[46] The Commission undertook a somewhat similar analysis as part of the 2003 TCPA Order, when it determined that even small businesses should be required to obtain a recipient's prior written permission before transmitting fax advertisements.[47] At that time, the Commission found "that given the cost shifting and interference caused by unsolicited faxes, the interest in protecting those who would otherwise be forced to bear the

---

45 47 C.F.R. § 64.1200(d)(6).

46 2005 Notice, ¶ 22; Junk Fax Prevention Act, § 2(f).

47 2003 TCPA Order, ¶ 191.

burdens of unwanted faxes outweighs the interests of companies that wish to advertise via fax."[48]

Such reasoning has lost none of its force today, even with the passage of the Junk Fax Prevention Act. The concern for small businesses who advertise via fax must be weighed against the burdens placed on those who pay the costs for printing, reviewing and disposing of these completely unwanted communications.[49] In our experience, many of those most severely affected by this advertising practice are themselves small or home-based businesses. The advertisers, on the other had, realize the economic advantage associated with shifting their advertising costs to the recipients, and they have the prospect of additional gains from any resulting business. We ask why the recipients should have to incur additional costs to exercise their opt-out rights in the hope of gaining some measure of relief. We submit that fairness alone requires that those who seek the benefits from fax advertising must bear the costs of honoring the requests of recipients who exercise their opt-out rights.

We note further that small businesses that are unable or unwilling to implement no-cost opt-out mechanisms on their own are not without options. They may consider contracting with fax broadcasters or other third parties that could, for a fee, provide the opt-out mechanisms as a natural complement to their fax transmission services.

---

48 Id.

49 According to complaints received by our offices, some of the most aggressive fax advertisers are small businesses.

4. An Opt-Out Request Terminates the EBR Exemption

The Commission seeks comment on whether a do-not-fax request terminates the EBR exemption, even if the request is sent to a fax broadcaster or other third party agent, or the recipient continues to do business with the sender. Any clear expression of a recipient's intent, whether oral or in writing, to opt-out from receiving unsolicited facsimile advertisements in the future should terminate the EBR exemption, even if the recipient continues to do business with the sender of the advertisement or, in the event the sender of the fax is a fax broadcaster or third-party agent, the underlying business.

Such a provision is consistent with the Commission's rules pertaining to telephone solicitations, which provide that a telephone subscriber's seller-specific do-not-call request terminates any EBR exemption with that company even though the subscriber continues to do business with the seller. 47 C.F.R.§ 64.1200(f)(3)(i). Under the EBR exemption, consent is implied. However, once a recipient makes it expressly known that he or she no longer wishes to receive unsolicited facsimile advertisements, that recipient has withdrawn consent, effectively terminating the EBR exemption with the sender. Moreover, any do-not-fax request sent to a third-party agent or fax broadcaster should extend to the underlying business.

Lastly, the Commission seeks comment on whether, subsequent to the receipt of a do-not-fax request, a recipient expressly invites or gives permission to that entity to send facsimile advertisements, the do-not-fax request is thereby terminated. We would agree that, once an express consent is given by the recipient, the sender may continue

to send fax advertisements, unless and until such time the recipient communicates another do-not-fax request to the sender. Such express consent, however, cannot be inferred merely because the subscriber continues to do business with the seller and is not subject to an EBR exception.

Consistent with the proposals above, the sender should bear the burden of maintaining records of do-not-fax requests, records showing that the requests were honored, as well as records showing that express consent was subsequently given. It has been the experience of the states in litigating TCPA cases that large-scale fax advertisers will claim that some recipients consented to receive the faxes, but they have no records to prove consent. Therefore, it should be the sender's responsibility to maintain evidence of consent by recipients, and the burden of proof demonstrating that the sender had the express invitation or permission of the recipients should remain with the senders.

5. A Nonprofit Exception to the Opt-Out Notice Requirement Is Not Necessary

The Commission specifically seeks comment on whether it should allow tax-exempt nonprofit professional organizations to send unsolicited fax advertisements without the mandated "opt-out" notice.[50] We oppose any weakening of recipients' ability to protect themselves from unwanted advertisements, and we urge the Commission to

---

[50] 2005 Notice, ¶ 26

reject any such exception. We are concerned by the failure to include a precise definition of "professional or trade association" in the 2005 Notice, so we are unable to estimate the possible scope of such an exemption. We are further troubled by the ambiguous nature of the phrase "in furtherance of the association's tax-exempt purpose."[51] Will, for example, advertisements sent by third parties who pay a fee to an association for the right to solicit its members be deemed to be in furtherance of the association's purpose because they generate revenues which fund the association's activities? Will the exemption apply to for-profit fax broadcasters who solicit funds for the association?

We believe that any discussion of such an exemption raises more questions than it answers. As a result, we propose that the Commission decline to exempt trade and professional organizations from the opt-out notice requirements.

6. Consent to Receive Fax Advertising Must Still Be "Express"

As part of the Junk fax Prevention Act, Congress also amended the TCPA's definition of "unsolicited advertisement" to provide that consent to receive advertisements may be given "in writing or otherwise."[52] While the amendment provides for alternate means for a person to communicate consent to receive advertisements, it

---

51 Junk Fax Prevention Act, § 2(e).

52 Id., § 2(g). As amended, "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5).

does nothing to ease the requirement that such consent be given in advance and that it be "express."

Advertisers who wish to claim that a recipient has authorized them to transmit fax advertisements must be able to prove that the recipient has given express consent. Such evidence may take the form of a writing, signed by the recipient, an email or similar electronic communication from the recipient (a record of which is retained by the advertiser), or the advertiser may record the recipient's oral acknowledgment. Regardless of the manner is which the consent is communicated, we suggest that it is not valid unless the advertiser discloses to the recipient the identities of all entities to whom such consent is being given. We also recommend that the Commission's revised rules provide that any express consent expire after the same time period mandated for an EBR. By establishing a uniform life span for all classes of legitimate fax advertisements, the Commission will enable all parties, whether advertiser, fax broadcaster, recipient or enforcement authority, to better understand their respective rights and obligations.

7. Other Issues of Concern

a. Time of day restrictions are needed

Although this issue is not raised specifically in the 2005 Notice, we propose that the Commission limit the transmission of fax advertisements to the hours of 8:00 a.m. and 9:00 p.m. local time at the recipient's location, as is currently done for telemarketing

calls.[53] We frequently receive complaints from recipients with home fax machines who have been disturbed by advertisements arriving in the middle of the night. The Commission itself acknowledged this problem in the 2003 TCPA Order when it took note of "the intrusiveness of faxes transmitted at inconvenient times, including the middle of the night."[54] We do not see any logical basis for treating unsolicited faxes from other telemarketing calls in this regard, and we suggest that the Commission subject all such advertising practices to the same limits.

b. The Commission should reaffirm the liability of fax broadcasters

Finally, we propose that the Commission reaffirm its conclusion, as expressed in the 2003 TCPA Order, that fax broadcasters[55] may be liable for violations of the statutes and rules governing fax advertising. Many fax broadcasters maintain their own databases of fax numbers and may, at times, exercise editorial control over ad content. The Commission concluded that fax broadcasters who had a high degree of involvement in preparing the ads and determining their destinations could be subject to sole or joint and several liability (along with the advertiser) for any violations.[56] The Junk Fax

---

53 47 C.F.R. § 64.1200(c)(1).

54 2203 TCPA Order, ¶ 186.

55 Fax broadcasters are entities who, for a fee, transmit other entities' advertisements to a large number of telephone facsimile machines. 2003 TCPA Order, ¶ 186; 47 C.F.R. § 64.1200(f)(4).

56 2003 TCPA Order, ¶¶ 194-95.

Prevention Act does nothing to change this, but we feel it would be beneficial for the Commission to reaffirm this conclusion in the context of its revised rules.

III. CONCLUSION

The Attorneys General have long viewed unsolicited fax advertisements as a serious problem affecting countless individuals and businesses. Such communications are a continuing invasion of privacy, impose unfair costs on the recipients, and are consistently a top area of complaint in our offices. We urge the Commission to consider our recommendations and to take this opportunity to enhance its rules to add protections important to our citizens. In so doing, the Commission will further our mutual consumer protection goals.

Respectfully submitted,

/s/ Mike Beebe
Mike Beebe
Attorney General of Arkansas

/s/ Richard Blumenthal
Richard Blumenthal
Attorney General of Connecticut

/s/ Gregory D. Stumbo
Gregory D. Stumbo
Attorney General of Kentucky

/s/ Patricia Madrid
Patricia Madrid
Attorney General of New Mexico

Dated: January 18, 2006